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IN THE

Supreme Court of the United States.

OCTOBER TERM, A. D. 1925.

No. 7 ORIGINAL, IN EQUITY.

STATES OF WISCONSIN, OHIO, PENNSYLVANIA AND MINNESOTA,

Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHCAGO,

Defendants,

AND

THE STATES OF MISSOURI, KENTUCKY, TENNESSEE AND LOUISIANA,

Intervening Defendants.

ANSWER OF INTERVENING DEFENDANTS, THE STATES OF MISSOURI, KENTUCKY, TENNESSEE AND LOUISIANA, TO THE AMENDED BILL OF COMPLAINT.

STATE OF MISSOURI,
By NORTH T. GENTRY,
Attorney General.

STATE OF KENTUCKY,
By FRANK E. DAUGHERTY,
Attorney General.

STATE OF TENNESSEE,
By FRANK M. THOMPSON,
Attorney General.

STATE OF LOUISIANA,
By PERCY SAINT,
Attorney General.

DANIEL N. KIRBY,
CORNELIUS LYNDE,
Solicitors.

BUNTHORP-WARREN PRINTING COMPANY, CHICAGO.

IN THE

Supreme Court of the United States

OCTOBER TERM, A. D. 1925.

No. 16 ORIGINAL, IN EQUITY.

STATES OF WISCONSIN, OHIO, PENNSYLVANIA AND MINNESOTA,

Complainants,

vs.

STATE OF ILLINOIS AND THE SANITARY DISTRICT OF CHICAGO,

Defendants,

AND

THE STATES OF MISSOURI, KENTUCKY, TENNESSEE AND LOUISIANA,

Intervening Defendants.

ANSWER OF INTERVENING DEFENDANTS, THE STATES OF MISSOURI, KENTUCKY, TENNESSEE AND LOUISIANA, TO THE AMENDED BILL OF COMPLAINT.

These defendants, the States of Missouri, Kentucky, Tennessee and Louisiana, by North T. Gentry, Attorney General of the State of Missouri, Frank M. Thompson, Attorney General of the State of Tennessee, Frank E. Daugherty, Attorney General of the State of Kentucky, and Percy Saint, Attorney General of the State of Louisiana, Daniel N. Kirby and Cornelius Lynde, their solicitors, reserving to themselves all right of exception to

the amended bill of complaint, for answer thereunto aver and say as follows:

1. These defendants admit that the complainant States of Wisconsin, Ohio, Pennsylvania and Minnesota are all States of the United States of America, and that they bring this action in this Court as such states.

2. These defendants admit that the State of Illinois is one of the states of the United States of America, and the defendant, The Sanitary District of Chicago, is a public municipal corporation under and by virtue of the laws of the State of Illinois and a citizen of Illinois, and these defendants aver that each of the intervening defendants, the States of Missouri, Tennessee, Kentucky and Louisiana, is one of the States of the United States of America.

3. These defendants deny that a controversy exists between the said complainant states and the defendants cognizable in this Court, and over which this Court has jurisdiction. These defendants aver that the subject matter of the cause of action set forth in the amended bill of complaint, upon which the complainants therein seek relief, relates solely and exclusively to the conduct of interstate commerce over the waters of the Great Lakes and the channels and harbors connected therewith and located along the shores thereof; that all of these waters, and all of the commerce, referred to in the amended bill of complaint, are interstate or international waters and interstate or international commerce, over which the United States has and has assumed exclusive jurisdiction, and for the following reasons these defendants do now hereby move that the amended bill of complaint herein be dismissed for want of jurisdiction and want of equity:

First. That it appears on the face of the amended bill of complaint that this cause is not a cause justiciable in this Honorable Court in the exercise by it of its original jurisdiction under the Constitution of the United States.

Second. That the subject matter of the amended bill of complaint relates exclusively to the navigability of the navigable waters of the United States and their use in interstate commerce, over which waters the United States possesses, has assumed and is now exercising superior, supreme and exclusive jurisdiction.

Third. That it appears upon the face of the amended bill of complaint, and by the admission of counsel for the complainants made in open court on the argument of the demurrer and motions heretofore filed by the defendants and intervening defendants, that the diversion of water from Lake Michigan, complained of in said bill of complaint, is being made pursuant to a written permit therefor, with the conditions of which the defendant, The Sanitary District of Chicago and the State of Illinois are duly and lawfully complying, and these defendants aver that said permit was duly issued and authorized by the Secretary of War and recommended by the Chief of Engineers of the United States, pursuant to the authority and provisions of the Rivers and Harbors Act of March 3, 1899, by which Act the Congress of the United States validly conferred upon said officials the power and authority, without regard to any state action, to permit, regulate and control the amount and conditions of such diversion, and that all of the acts of said defendant, The Sanitary District of Chicago, have been validly and lawfully authorized by proper Acts of the Legislature of the State of Illinois, pursuant to the Constitution of said State.

Fourth. That the amended bill of complaint fails to

state facts entitling complainants to relief in equity as therein prayed, because:

(a) In seeking an injunction to restrain the permanent diversion from Lake Michigan of any water whatsoever, it relates solely to subject matter over which the Congress of the United States has and has exercised exclusive jurisdiction.

(b) In seeking to have this Honorable Court determine the amount of diversion from Lake Michigan reasonably to be required for navigation, the amended bill of complaint seeks to impose upon this Court the exercise of powers and functions vested by the Constitution of the United States in the Congress and by the Congress lawfully delegated to the Secretary of War upon recommendation of the Chief of Engineers by whom such authority is and has been lawfully exercised.

(c) In that it appears upon the face of the amended bill of complaint that the alleged damage to navigation, due to the lowering of Lake levels and interfering with navigation on the Chicago River or on the Sanitary and Ship Canal of the defendant The Sanitary Dstrict of Chicago, or on the Desplaines, Illinois or Mississippi Rivers, by pollution thereof, in nowise whatsoever constituted any direct or actual damage to the complainant states, but solely, as in the bill of complaint alleged, to their respective citizens, and that the exclusive power to redress injuries to the citizens of said states for interference with navigation conducted by said citizens in interstate commerce is vested solely in the United States.

Fifth. That it affirmatively appears on the face of the amended bill of complaint that the United States is a necessary and indispensable party to this suit, vested as it exclusively is, with the power to regulate and control navigation of interstate waters.

Sixth. Because the original bill admitted the right of the defendants to a diversion of water from Lake Michigan not in excess of 4167 c. f. s. under the then existing permit of the Secretary of War; and also to a diversion in excess of said amount if and

when the Congress of the United States or the Secretary of War on the recommendation of the Chief of Engineers, should so permit, while the amended bill of complaint denies each of such rights, and complainants are therefore now estopped from any claim to the relief prayed for, based upon the denial of such rights.

Seventh. Because the joinder of the complainant states is improper and the amended bill of complaint is multifarious and in other respects uncertain, informal and insufficient, and does not state facts sufficient to entitle the said complainants or either of them to the equitable relief prayed in said bill.

These defendants admit that this action is brought in this Honorable Court as an attempt to invoke the exercise of its original jurisdiction on the claimed ground that it is an action in equity relating to an alleged controversy between two or more states of the United States, and also between states of the United States and citizens of another state.

4. These defendants admit the allegations in paragraph 4 of the amended bill of complaint, except as to the amount of freight received during the year 1923 at the several harbors of the State of Wisconsin including the Duluth-Superior harbor, as to which these defendants are not informed and call for strict proof.

5. These defendants admit the allegations of paragraph 5 of the amended bill of complaint, except as to the tonnage of the several harbors mentioned, which also include the harbor of Duluth-Superior and the tonnage thereof, as to which these defendants are not informed and call for strict proof.

6. These defendants admit the averments of paragraph 6 of the amended bill of complaint, except as to the tonnage alleged to be received or shipped as to the harbors mentioned, as to which these defendants are not informed and call for strict proof.

7. These defendants admit the averments of paragraph 7 of the amended bill of complaint, except as to the tonnage alleged to be received or shipped as to the harbors mentioned, as to which these defendants are not informed and call for strict proof.

8. These defendants admit the averments of paragraph 8 of the amended bill of complaint, and further show that, beginning with the year 1848, by reason of the construction of the Illinois and Michigan Canal and its enlargement thereafter, in early years during a large part of each year, and thereafter during the entire year, a large amount of water from the Chicago River and its several branches did not flow into Lake Michigan, but flowed through the Illinois and Michigan Canal to the Desplaines, Illinois and Missisippi Rivers.

9. These defendants admit the averments of paragraph 9 of the amended bill of complaint, but these defendants further aver on information and belief that by virtue of the provisions of said Act of 1899, in said paragraph 9 of the amended bill of complaint set forth, neither the defendant, The Sanitary District of Chicago, nor the State of Illinois now claim to possess authority to divert any water whatsoever from Lake Michigan in excess of the amount authorized from time to time by the Secretary of War, upon the recommendation of the Chief of Engineers, under the provisions of Section 10 of the Rivers and Harbors Act of March 3, 1899, or by the Congress of the United States.

10. These defendants admit all the averments of paragraph 10 of the amended bill of complaint.

11. These defendants admit the allegations of paragraph 11 of the amended bill of complaint, except that, on information and belief, the defendant The Sanitary District of Chicago, began the construction of its Sani-

tary and Ship Canal during the year 1890 and long prior to the 3rd day of September, 1892.

12. These defendants neither admit nor deny the averments of paragraph 12 of the amended bill of complaint, but call for strict proof.

13. These defendants admit all the averments of paragraph 13 of the amended bill of complaint, except that they are informed and believe that the main channel of the Sanitary and Ship Canal of the defendant The Sanitary District of Chicago, was opened on the 17th day of January, 1900.

14. These defendants neither admit nor deny the averments of paragraph 14 of said amended bill of complaint, but adopt as their answer the averments of the 14th paragraph of the answer of the defendant The Sanitary District of Chicago to the amended bill of complaint herein.

15. These defendants admit all the averments of paragraph 15 of the amended bill of complaint.

16. These defendants neither admit nor deny the allegations of paragraph 16 of the amended bill of complaint, but call for strict proof thereof.

17. These defendants deny the allegations of paragraph 17 of said amended bill of complaint, and aver, upon information and belief, that the primary purpose of the State of Illinois and The Sanitary District of Chicago in the construction of the Sanitary and Ship Canal of said Sanitary District was to create a deep waterway available for the navigation of the largest ships traversing the Great Lakes, which could also be utilized as a means of disposing of the sewage of the City of Chicago and contiguous territory; and further aver on information and belief that the legislation of Illinois and the acts of the defendant District, pursuant thereto, in

reference to the generation of electrical energy by utilization of the flow of water from Lake Michigan through the Canal of said defendant District, was merely an incident to the development of said primary purpose aforesaid, and a proper conservation of energy which would otherwise be wasted.

18. These defendants neither admit nor deny the averments of paragraph 18 of the amended bill of complaint, but call for strict proof thereof.

19. These defendants admit that all of the water diverted from Lake Michigan by the defendants State of Illinois and The Sanitary District of Chicago, as aforesaid, is carried into the Mississippi Valley and permanently abstracted from the Great Lakes system. These defendants are not informed as to the exact effect upon the mean levels of the water in Lakes Michigan, Huron, Erie and Ontario, and the various waterways connecting said lakes and the St. Lawrence River above tide water, resulting from such permanent diversion of water from Lake Michigan. These defendants are informed and believe that the determination of such effect comprehends the determination of the composite effect of a large number of indefinite factors and presents a problem of great difficulty, which these defendants are informed has never been definitely solved, and these defendants believe and aver that the lowering of said mean levels traceable exclusively to such diversion does not exceed 4¾ inches; and further aver that the full effect upon the levels of the Great Lakes from said diversion is fixed and has been fixed for a number of years past and will not increase in the future.

20. These defendants deny each and all of the averments of paragraph 20 of the amended bill of complaint, and further aver that they are informed and believe that

any method of treating sewage of a population as large as that of the City of Chicago and its contiguous territory, necessarily requires the use of large amounts of water in the treatment thereof, and consequently these defendants allege that even under the most modern processes of the art of sewage disposition, the use of a large and material amount of water from Lake Michigan would be required, as to the exact amount of which, however, these defendants are not informed.

21. These defendants deny that the alleged lowering of the level of Lake Michigan has seriously or substantially diminished the use of the ports of Wisconsin located on that Lake, as enumerated in paragraph 4 of the amended bill of complaint, by reducing at least six inces or any other amount in each of these ports in Wisconsin the draft of vessels which can be accommodated therein for loading and unloading. These defendants are not informed as to the percentage of the tonnage of freight received at said Wisconsin Lake Michigan ports, which consists of coal shipped from eastern states, but they are informed and believe that most of such coal so received at Wisconsin Lake Michigan ports is carried into said ports by car ferries which are relatively shallow draft vessels and capable of navigating all of said ports even though the navigable depths therein were considerable less than the lowest navigable depths obtainable in said ports at any time during the last twenty years.

These defendants deny that such eastern coal, shipped into Wisconsin by water through said Lake Michigan ports, constitutes the principal source of coal for the State of Wisconsin, in its proprietary capacity as owner of public buildings and institutions, and of many thousands of individuals and industrial plants located in said state, but these defendants admit that a considerable amount of said coal is so transported and is so used.

These defendants further aver on information and belief, that the principal source of the coal so used by the State of Wisconsin, as owner of public buildings and institutions, and by citizens thereof individually and in their commercial undertakings, is coal produced in the mines of Illinois, Indiana and Kentucky, and shipped by rail from such mines into the consuming points in the State of Wisconsin; that the distance required in the transportation of such coal is much less than the distance the eastern coal referred to in paragraph 21 of the amended bill of complaint must be carried, and although the movement of such coal is all rail, the transportation cost is much less than the combined rail and water rates applicable to the movement of eastern coal referred to in said paragraph 21 of said amended bill of complaint, and the freight differential in favor of Illinois, Indiana and Kentucky coal is so great that by no possibility whatever could any saving in the cost of transportation of eastern coal in bulk or other freighters on the Great Lakes inure to the benefit of the State of Wisconsin or consumers of coal in said state. These defendants deny that any burden is imposed upon the State of Wisconsin, in its proprietary capacity, or upon any of its people, by reason of the alleged increase in the cost of coal in said state, due to the increase in the cost of transporting said coal by water over the Great Lakes into said state.

These defendants further aver that the transportation of water borne coal aforesaid is interstate commerce, over which the United States has assumed exclusive jurisdiction; that all of the harbors and ports of the State of Wisconsin, referred to in the amended bill of complaint require for their maintenance constant dredging each year. Under normal conditions any dredging required by virtue of any effect of said diversion on

said parts or harbors is negligible and of no consequence; and further aver that all of said harbors have been dredged and the harbors improved by the United States, at its expense, since the opening of the Sanitary and Ship Canal of the defendant District, and have been made and planned by the United States upon the basis of the withdrawal of 10,000 cubic feet per second of water at Chicago, and in full contemplation of the effect thereof upon lake levels and designed to equalize such effect.

22. These defendants admit that in addition to the Wisconsin ports enumerated, located along the shores of the Great Lakes there are a large number of ports located along the shores of Lake Michigan adjacent to the States of Illinois, Indiana and Michigan; on Lake Huron in the State of Michigan and the Dominion of Canada; on Lake Erie in the States of Michigan, Ohio, Pennsylvania and New York and the Dominion of Canada, and on Lake Ontario in the State of New York and Dominion of Canada. These defendants deny that the lowering of the level of all of said lakes by the acts of the defendants, State of Illinois, and The Sanitary District of Chicago, has lessened the utility of all of the ports on said lakes, or any of them, and of the waterways connecting said lakes or any of them, in the manner alleged in said amended bill of complaint. These defendants admit that in the conduct of transportation and interstate commerce between Wisconsin, Minnesota, Ohio and Pennsylvania ports, and the ports in other states, it would be possible by reason of decreased depths to so reduce the capacity of vessels carrying such commerce as to materially increase the cost of such transportation; but these defendants allege that the vessels engaged in such transportation are very largely bulk freighters,

carrying in the main, bulk commodities such as grain, ore and coal; that in the loading of such vessels with such bulk commodities it is impossible to so load them as to bring the draft of such vessels to within five or six inches of a given figure; that there is at no time any permanent water level of the Great Lakes or any of them, but barometric pressure, winds, and other natural phenomena constantly produce from moment to moment, variations in these levels; that the clearance over the bottom requires a margin of safety, and in the practical conduct of such transportation the slight lowering of the levels of the Great Lakes which may be traceable to the acts of the defendants, State of Illinois and The Sanitary District of Chicago, has no appreciable or substantial effect, either on the actual loading of such vessels, or still less upon the cost of such transportation.

These defendants deny that the total annual loss due to the lower carrying capacity of Lake vessels, chargeable directly to the diversion of water by the defendants, State of Illinois and The Sanitary District of Chicago, amounts to many millions of dollars or to any sum whatsoever, or to any sum which can be ascertained and considered by this Honorable Court, as actual legal damage; and further deny that a large part or any of said loss falls upon the people of the States of Wisconsin, Minnesota, Ohio and Pennsylvania, or any of them; and further deny that any of such loss or a material portion thereof is widely distributed through all parts of said states. These defendants aver that all of the commerce referred to in said paragraph 22 of said amended bill of complaint and throughout said bill is interstate commerce, carried on over and upon navigable waters of the United States, over which the Congress has, under the Constitution of the United States, exclusive jurisdiction,

and has assumed and is exercising such jurisdiction; that the supposed injury and damage alleged in paragraph 22 of said amended bill of complaint, concerns and relates to alleged interference with interstate commerce, concerning which said complainants have no right or jurisdiction to complain.

23. These defendants deny that the diversion of water, as aforesaid, has seriously impaired or impairs in any appreciable or substantial degree the navigability of the Chicago River by introducing into said River a current so swift as to make navigation thereof difficult or dangerous, or by, in any other way, impeding navigation therein.

These defendants aver, on information and belief, that navigation in the Chicago River has been vastly improved by the acts of the defendants, State of Illinois and The Sanitary District of Chicago, through the expenditure by said State, District and City of many millions of dollars for the deepening, straightening and widening of said river.

These defendants aver, on information and belief, that the decrease in handling of commerce by vessels in and out of the Chicago River has resulted from the tendency to so greatly increase the size of such vessels as to make them very difficult to handle in the river; and further aver, on information and belief, that interstate commerce over the waters of the Great Lakes to and from the City of Chicago and the Chicago industrial district has not in fact decreased, but has greatly increased, the larger vessels being now docked, loaded and unloaded at points on the shores of Lake Michigan adjacent to or within the City of Chicago, more convenient for the handling of large vessels than the Chicago River.

These defendants further deny, on information and belief, that any portions of the Chicago River, usable or useful in navigation thereof, have become entirely closed up by reason of said diversion, and thus rendered unusable to the people of Wisconsin or any other person or persons.

24. These defendants admit that prior to the construction of the Sanitary and Ship Canal of The Sanitary District of Chicago, the Desplaines and Illinois Rivers constituted a navigable waterway, extending from Lake Michigan on the east to the Mississippi River on the west, and aver that said rivers are and always have been such navigable waterway; and these defendants further allege that said Sanitary and Ship Canal now constitutes a part of said waterway and is a vast and material improvement over the portion thereof for which it may be now substituted. These defendants deny that in the construction of said Sanitary and Ship Canal the defendant District, materially modified or altered said navigable waterway aforesaid, by diverting certain portions of the Desplaines River from its original bed. These defendants deny that said diversion aforesaid has had any injurious effect upon the navigable capacity of the West Fork of the South Branch of the Chicago River. These defendants admit that said Canal by reason of its greatly increased capacity and practicability has become in fact a substitute for said old navigable waterway, referred to in paragraph 24 of said amended bill of complaint, and they further admit that said Canal is now the only practicable means of navigation by water from Lake Michigan to the Mississippi River.

These defendants allege that about the year 1848, the Illinois and Michigan Canal was constructed by the State of Illinois, pursuant to Acts of Congress passed

in the years 1822 and 1827, and extended from the West Fork of the South Branch of the Chicago River along the line of the waterway referred to in said amended bill of complaint to and through the City of Joliet and along the Desplaines and Illinois Rivers to the Illinois River at La Salle, Illinois; and that said Illinois and Michigan Canal took the place of the old natural waterway referred to in said amended bill of complaint, and was used and still is used solely for navigation and as a substitute for said old natural waterway.

These defendants aver that the Sanitary and Ship Canal of the defendant The Sanitary District of Chicago has become a substitute for the upper portion of said Illinois and Michigan Canal, from Chicago to Joliet, and is now the only practical means of navigation between the Chicago River and the Illinois and Michigan Canal at Joliet; that the portion of said old canal extending north from Joliet as originally constructed, is in its present state useless as a means of navigation, as a result of lack of water therein and various obstructions in said canal, but that the portion of said old Illinois and Michigan Canal extending from Joliet to the Illinois River at La Salle is now used and operated for navigation purposes.

These defendants aver that since the construction of the main channel of the defendant District's Sanitary and Ship Canal, commerce has used this completely modern and practical waterway from the Chicago River to Joliet; that said Sanitary and Ship Canal is six times as deep and four times as wide as the old Illinois and Michigan Canal as it existed and was operated prior to the completion of the main channel of said Sanitary and Ship Canal.

These defendants, on information and belief, deny

that the said The Sanitary District of Chicago, or the State of Illinois, have always expressly, or in any manner whatsoever, refused to concede that said Sanitary and Ship Canal was substituted as aforesaid for the original Illinois and Michigan Canal is a navigable waterway of the United States, and further deny that under the provisions of said Act of 1899, and particularly Section 24 thereof, as quoted in paragraph 9 of said amended bill of complaint, or any other provisions or enactments of law, or official action of any kind, the said defendants State of Illinois and The Sanitary District of Chicago have undertaken to bar the Government of the United States from all or any control or authority over said Canal, as alleged in paragraph 24 of said amended bill of complaint; and further deny that said defendants last named have undertaken to make the control and authority of said Government of the United States subordinate to the use of said Canal for sanitation and drainage purposes or otherwise; and these defendants aver that the said Sanitary and Ship Canal has been used, and is now used, and has been continuously operated and maintained in such a manner as to provide for free, easy and convenient navigation thereon; and that said Sanitary and Ship Canal serves all the purposes of navigation, and that its use for sanitation and drainage purposes has not conflicted and does not conflict with its use for navigation, and such supplemental sanitation and drainage uses have not impaired and do not impair the navigation use thereof.

These defendants further aver, on information and belief, that under the Acts of the State of Illinois in reference thereto, navigation on said Sanitary and Ship Canal is required to be free, without payment of fees at locks, or other charges therefor; and further aver that

the United States has already taken and assumed, and for many years last past has had exclusive jurisdiction over navigation upon said Sanitary and Ship Canal.

25. These defendants deny each and all of the averments of said amended bill of complaint in paragraph 25 thereof, as to the amount of water necessary to be diverted from Lake Michigan for navigation purposes on said waterway from Lake Michigan to the Gulf of Mexico. These defendants will hereinafter more specifically answer the averments of said amended bill of complaint in said paragraph 25 in this regard.

26. These defendants admit that paragraph 26 of said amended bill of complaint correctly sets forth true and correct copies of the various permits signed by the respective Secretaries of War, Assistant Secretaries of War and Acting Secretaries of War therein named, upon the dates therein set forth. These defendants further admit the allegations contained in said paragraph 26 as to the suit brought by the United States of America in the Northern District of Illinois, to enjoin the defendant, The Sanitary District of Chicago, from diverting a greater amount of water from Lake Michigan than the amount authorized by certain permits referred to in said amended bill of complaint, and further admit that the decree entered in said cause is correctly set forth in said paragraph 26.

These defendants further aver that the several permits referred to in said paragraph 26 lawfully authorized the said defendants The Sanitary District of Chicago and the state of Illinois, to divert and withdraw from Lake Michigan the quantities of water in said permits specified, and constituted complete and lawful authority therefor, and for all the results thereof.

28. These defendants admit that pursuant to the provisions of Section 10 of the Act of Congress approved March 3, 1899, entitled, "An Act making appropriations for the construction, repair and preservation of certain public works on Rivers and Harbors, and for other purposes," and under the full and lawful authority thereof, on March 3, 1925, Major General H. Taylor, Chief of Engineers, and the Honorable Joseph H. Weeks, Secretary of War, made and entered the order eorrectly set out in said paragraph 28 of said amended bill of complaint.

These defendants deny each and all of the other allegations contained in said paragraph 28, and these defendants further aver that heretofore, on the oral argument before this Court of the motion to dismiss heretofore made by these defendants, and the demurrer of defendant the State of Illinois, to the amended bill of complaint, counsel for the complainants herein specifically admitted in open court, in response to a question addressed to him by one of the Justices of this Honorable Court, that the defendant, The Sanitary District of Chicago, and the City of Chicago, had fully and completely, and in entire good faith, complied with each and all of the conditions of said order and permit, and these defendants aver that the complainants herein are bound by said admission, and for the purposes of this cause the averments contained in said paragraph 28 of said amended bill of complaint, alleging on information and belief that the defendants State of Illinois and The Sanitary District of Chicago have failed to comply with the conditions of said order and permit, must be taken as untrue and of no force and effect. And these defendants pray as to the extent to which the defendant The Sanitary District of Chicago has complied with the con-

ditions of said order and permit, to refer to the allegations contained in relation thereto in paragraph 28 of the answer heretofore filed by The Sanitary District of Chicago to said amended bill of complaint, and pray leave to adopt the same.

29. These defendants deny that the acts of the defendants State of Illinois and The Sanitary District of Chicago, in diverting water from Lake Michigan into the canal of the defendant District, have never been authorized by Congress, but on the contrary allege that each and all of their acts have been duly authorized by the Congress; and these defendants further deny that said acts or any of them are in violation of the legal rights of the states of Minnesota, Michigan, Ohio and Pennsylvania, or either of them, or of the legal rights of the people of said states, or any of them, in any respect whatsoever; and these defendants further deny that by said acts the defendants State of Illinois and The Sanitary District of Chicago are interfering with the common law right of said states of Minnesota, Michigan, Ohio and Pennsylvania, or either or any of them, or of their people, to have the free and unobstructed use of Lake Michigan and the various ports and harbors thereof, within the borders of said states, for the purpose of navigation, trade and commerce, free from any and all interference with the natural navigable capacity of said Lake or said harbors by any agency other than the states of Minnesota, Wisconsin, Ohio and Pennsylvania, or the United States Government, or any one or more of them. These defendants are not advised as to the existence of any common law right pertaining to said complaining states, or either of them, and deny as a matter of law that there is any common law pertaining to the respective states of the United States of America in their relations to and with each other. These defendants further deny that by said

acts aforesaid of the defendants aforesaid, there has resulted any interference whatsoever with the right of the people of Wisconsin, Minnesota, Ohio and Pennsylvania, or any of them, to the free and unobstructed navigation of Lakes Michigan, Huron, Erie and Ontario, and the navigable waters between said lakes, and from said lakes into the Mississippi River and the Atlantic Ocean. And these defendants further deny the existence of any common law right in said people to said navigation aforesaid, but allege that all the rights of said people arise by reason of their citizenship in the United States of America, and these defendants specifically deny that any of said claimed rights of the people of said complaining states arise by reason of any express guaranty contained in the Ordinance for the Government of the Territory Northwest of the River Ohio, enacted by Congress on June 13, 1787; and these defendants further deny that by said acts aforesaid, the State of Illinois or The Sanitary District of Chicago, or either of them, are in any manner whatsoever violating the provisions of the Act of Congress of March 3, 1899, known as the Rivers and Harbors Act of 1899, or of the provisions of Section 10 thereof, or any other provisions thereof.

30. These defendants deny each and every one of the averments of paragraph 30 of the amended bill of complaint.

31. These defendants deny that the alleged violations of the legal rights of the complainants and of the respective peoples of the complaining states, have caused, now cause or will continue to cause in any way whatsoever serious interference with the interstate trade and commerce of the people of the complaining states, or any damage whatsoever to the respective complaining states in their proprietary capacity, resulting in any pecuniary

loss whatsoever to said respective peoples or respective states.

And these defendants further allege that the prayer of said amended bill of complaint is improper and not one to be considered by this Honorable Court, in that the same asks the Court to determine the amount of water reasonably required for the purpose of navigation to be diverted from Lake Michigan in and through said canal and connecting waters to the Illinois and Mississippi Rivers, since the determination of that question involves the exercise of legislative functions and presents a question not justiciable before this Honorable Court; and these defendants further allege that the Congress of the United States is authorized under the Constitution of the United States to delegate to the Secretary of War, power and authority to authorize the diversion of waters from Lake Michigan, through said Lakes to the Gulf Waterway, for purposes of navigation and purposes other than those of navigation, as will be hereinafter more fully set forth.

32. These defendants further allege that as appears by paragraph 28 of said amended bill of complaint the diversion of water from Lake Michigan is now taking place pursuant to the terms and permission of the permit issued by the Secretary of War on recommendation of the Chief of Engineers, March 3, 1925; that the Secretary of War and Chief of Engineers are specifically authorized by the provisions of Section 10 of an Act of Congress, approved March 3, 1899, entitled "An Act making appropriations for the construction, repair and preservation of certain public works on rivers and harbors, and for other purposes" to authorize alterations in the capacity and modifications in the course, location and condition of any of the navigable waters of the

United States and to thereby authorize diversion of water from the Great Lakes. That the Secretary of War and his subordinate officers in the War Department of the United States Government, are charged by the various Acts of the Congress of the United States, under the provisions of the Constitution of the United States, with numerous duties in connection with the preservation and creation of navigable waters and waterways of the United States, and in regulating and controlling the use of such waterways in carrying out certain policies of Congress enacted pursuant to its power to regulate interstate commerce. And these defendants allege that for the reasons hereinafter set forth, the Secretary of War and the Chief of Engineers in issuing the permit of March 3, 1925 performed said act in the exercise of the discretion imposed upon them by Congress under the power to foster, create and preserve the national defense, the power to regulate, construct and utilize the navigable waters of the United States, and through the utilization of such waterways the power to regulate interstate commerce.

33. That under the provisions of Section 8 of Article 1 of the Constitution of the United States, the Congress is given power to declare war; to raise and support armies; to provide and maintain a navy; to make rules for the government of the land and naval forces; to provide for calling forth the militia to execute the laws of the Nation, suppress insurrections and repel invasions. That under the provisions of Article 2 of the Constitution, the executive power is vested in the President of the United States, who is Commander in Chief of the Army and Navy of the United States. He may require the opinion in writing of the principal officer of each of the executive departments. Pursuant to these provisions of the Constitution, the Congress has created

the War Department and provided for the office of Secretary of War, the principal officer in this executive department of the Government, and has imposed upon him by various statutes from time to time, numerous duties and powers in reference to the national defense. Among the duties imposed upon the Secretary of War and the War Department are the control and regulation of the navigable waters of the United States, indicating conclusively thereby the conclusion of the Congress that in its wisdom the waterways of the United States are an essential element in the national defense. As the development of this country and the character of its civilization has become more complicated, transportation has become increasingly important to the national defense. Wars cannot be effectively conducted without available transportation. Reliance upon the railroads of the country as the exclusive means of transportation in time of war would be an unwise and unsafe policy, and from the beginning of the government it has been the policy of the Congress, through the Secretary of War, to control, regulate, foster and preserve in their utmost usefulness for purposes of transportation, and as an element of the national defense, the navigable waters of the United States.

As alleged in the amended bill of complaint much commerce between ports in different states is conducted over the navigable waters of the Great Lakes. Each of the Great Lakes, except Lake Michigan, borders upon a foreign country, and in the event of war with such country, this commerce, important as it is, would be subject to immediate interruption. Creation, fostering and preservation of waterways within the territorial limits of the United States and thus less subject to foreign agression, is important in the national defense; and in the exercise of the power and responsibility in him imposed by the Congress, pursuant to the constitutional provisions

aforesaid, the Secretary of War is vested with discretion to create, regulate and improve the navigable waterway from the harbor of Chicago, through the Sanitary and Ship Canal of the defendant The Sanitary District of Chicago, the Illinois and Desplaines Rivers and the Mississippi River to the Gulf of Mexico, as this waterway in the event of disaster to the commerce conducted over the Great Lakes would be available for the movement of troops and munitions, and for the preservation of those fundamental industries, without which under modern conditions war cannot be successfully waged.

34. For many years inland navigation has been conducted on the waters of the Mississippi River, and in the original settlement of the Mississippi Valley this avenue of transportation was the most important element. In recognition of this the Congress has consistently appropriated from year to year sums for the regulation, preservation and maintenance of conditions in the Mississippi River and its tributaries helpful to navigation and the conduct of such commerce. The Mississippi River extends for purposes of navigation from the cities of Saint Paul and Minneapolis in the State of Minnesota to the Gulf of Mexico, and traverses or marks the borders of the states of Minnesota, Wisconsin, Iowa, Illinois, Missouri, Kentucky, Tennessee, Arkansas, Mississippi and Louisiana. It possesses two tributaries of almost equal importance and magnitude,—the Ohio and Missouri Rivers. The Ohio, for navigation purposes, extends a considerable distance into the State of Pennsylvania, and then through or bordering upon the states of West Virginia, Ohio, Kentucky, Indiana and Illinois. The Missouri River rises in the Rocky Mountains and then traverses or marks the boundaries of the states of Nebraska, North Dakota, South Dakota, Iowa, Kansas and Mis-

souri. The Illinois River, with its tributaries and The Sanitary and Ship Canal of the defendant The Sanitary District of Chicago, furnish an available water route connecting this long highway of navigation and commerce with the water transportation of the Great Lakes. At the present time navigation is conducted on the Mississippi River in large volume to the City of St. Louis, and during a considerable portion of the year a depth of 9 feet is maintained. The projected depth called for by the several appropriation Acts of Congress, pursuant to its policy of furnishing and maintaining adequate conditions for navigation on this waterway is for a projected depth of 9 feet on the Mississippi to the mouth of the Ohio; of 8 feet from the mouth of the Ohio to the City of St. Louis; of 7 feet from the City of St. Louis to Grafton, Illinois, the mouth of the Illinois River, and of 6 feet from Grafton to the head of navigation at the Twin Cities. During a considerable portion of the year these depths are not maintained, due to insufficient water in the River, and peculiar conditions obtaining therein, which result in a fluctuating channel and frequent formation of bars and other obstructions to navigation. In the original state before the works of man altered the conditions of nature, bordering upon the upper waters of the Mississippi were vast areas of swamp lands, which in the Spring, in time of freshets, were overflowed and filled with large quantities of water, which slowly thereafter drained off, thus serving as adequate reservoirs for the maintenance of an approximately uniform flow in the river. As civilization has proceeded throughout this territory many of these lands have been drained, and the available area of reservoir has been very greatly reduced. At the same time the works undertaken by the War Department in aid of the maintenance of adequate

depths in the river, the deepening of channels, the restricting of the flow by wing dams and other construction have all tended to furnish a channel capable of more rapidly carrying off the water than the original condition of the river. These changes in the condition and regimen of the river have resulted in a lengthening of the periods of low water, during which navigation is interfered with, and at times prevented, due to lack of navigable depths at many places along the channel. The natural conditions of the Mississippi River and its peculiarities have always rendered navigation thereon uncertain and subject to interruptions. These same conditions to an even greater degree hamper and impede navigation on the Missouri River, and also to a greater extent upon the Ohio River and the other tributaries of this vast network of navigable systems affording when these difficulties are overcome the most available means of inland water transportation and serving the largest productive areas to be found in the world.

35. Settlement of the Mississippi Valley, originally dependent entirely upon water transportation, was greatly increased by the creation of a network of railroads connecting the important centers, practically all of which, however, had been originally located because they severally had available water transportation. The growth of railroad facilities resulted in the paralleling of all of the water routes by numerous railroad lines, and inevitably the railroads competed with the water carriers for the handling of transportation between all points in the Mississippi Valley and between such points and the seaboard. The difficulties of navigation and the lack of adequate organization among those conducting it, the more speedy handling of traffic by the railroads and the great increase of facility of transportation by the

railroads, all tended to make railroad transportation preferable when costs at all approximated the cost of water transportation. The railroads consistently followed the policy of driving the water carriers out of existence by publishing and maintaining rates which equaled and in many instances were lower than the available water rates. These competitive rates, made in every instance for the purpose of taking away from the water carrier the available commerce, were invariably much lower than the normal level of rates which the rail carriers had to maintain in order to earn an adequate return on their capital investment, or a profit on their operation, and invariably when water transportation had been eliminated the railroads, if they were not restrained from so doing by laws or regulations resulting therefrom, would increase their rates up to the normal level, thus frequently disrupting and impairing the commercial structure of the country which had grown up through the upbuilding of communities at points where the cheaper water transportation was available.

During the decades immediately following the Civil War the building of railroads proceeded with remarkable speed, and necessarily resulted in fierce and unrestricted competition, not only between the railroads and water carriers, but between the railroads themselves. This competition produced discrimination between places, commodities and individuals, and frequently resulted in such an impairment of revenues of the competing railroads as to seriously hamper their ability to adequately render transportation service to the public. As a result, in 1887, pursuant to its power to regulate commerce the Congress enacted the Act to Regulate Commerce which, with the amendments and supplemental acts added from time to time, imposed upon the railroads, common car-

riers engaged in interstate commerce, the duty of charging no more than reasonable rates, the duty of avoiding undue and unreasonable discrimination between persons, communities, commodities or different classes of traffic, and the duty of maintaining their published rates. This system of regulation was followed by similar systems of regulation by the several states over the commerce conducted by railroads between points within these states. The rates of the railroads were not and could not in the very nature of things, be uniform for all classes of traffic and between all points. Frequently rates were created for the purpose of stimulating the location and upbuilding of new industries at suitable locations, thus providing additional traffic to the railroads. All of the railroad rates throughout the Mississippi Valley were influenced and affected by the existence of the available means of transportation afforded by the Mississippi, Ohio and Missouri Rivers and their tributaries, and by the water commerce of the Great Lakes. The Congress in its wisdom did not require uniformity of rates between all points and for all classes of traffic, as any such requirement would have most seriously hampered if it had not destroyed the commercial welfare of the entire Mississippi Valley. The railroads were permitted, under the provisions of the Act to Regulate Commerce and acts amendatory thereof and supplemental thereto, to maintain rates for the purpose of meeting water competition and competition by longer and more circuitous rail routes which would be at a lower level than rates to intermediate points.

36. As a result of the greatly increased facilities of railroad transportation through the improvement in the mechanism used, the creation of many new and valuable services, also more particularly as a result of the com-

petition above described, and the failure of the inland water carriers to organize to meet rail competition, water transportation upon the inland waterways of the Mississippi Valley practically ceased to exist and only a very few unimportant and ineffectual remnants were left by the time the World War had begun. During the World War there was imposed upon the normal commerce of the country tremendous burdens in handling war munitions and troops, which strained to the utmost the transportation facilities of the country. Much commercial traffic had to be abandoned or decreased in amount by reason of this overwhelming and superior demand. Due to this burden of wartime commerce and the changed conditions resulting from the necessities of the War, Congress, in the exercise of its war powers, authorized the President to take over the railroad systems of the country; and further, as a measure of relief to the overburdened railroad systems, authorized and directed the Director General of Railroads to begin water transportation upon the Mississippi River between St. Louis and New Orleans, upon the Black Warrior River in Alabama, between Birmingham and Mobile, and upon the Erie Canal in New York, upon which rivers, as aforesaid, water transportation had theretofore practically ceased.

In the beginning of this water transportation on these Rivers it became necessary to construct an entirely new mechanism and to create new and improved units of transportation; and pursuant to the direction of Congress the Director General of Railroads brought into existence the Mississippi-Warrior Barge Line. At the termination of government possession and control of the railroads the Secretary of War was directed to continue the transportation conducted on the Barge Line in the waterways last mentioned, and the policy of Congress

in connection with inland transportation was authorized and declared in Sections 201 and 500 of the Transportation Act of 1920 in the following language:

"SEC. 201. (a) On the termination of Federal Control, as provided in Section 200, all boats, barges, tugs, and other transportation facilities, on the inland, canal, and coastwise waterways (hereinafter in this section called 'transportation facilities') acquired by the United States in pursuance of the fourth paragraph of section 6 of the Federal Control Act (except the transportation facilities constituting parts of railroads or transportation systems over which Federal control was assumed) are transferred to the Secretary of War, who shall operate or cause to be operated such transportation facilities so that the lines of inland water transportation established by or through the President during Federal control shall be continued, and assume and carry out all contracts and agreements in relation thereto entered into by or through the President in pursuance of such paragraph prior to the time above fixed for such transfer. All payments under the terms of such contracts, and for claims arising out of the operation of such transportation facilities by or through the President prior to the termination of Federal control, shall be made out of moneys available under the provisions of this Act for adjusting, settling, liquidating and winding up matters arising out of or incident to Federal control. Moneys required for such payments shall, from time to time, be transferred to the Secretary of War as required for payment under the terms of such contracts.

(b) All other payments after such transfer in connection with the construction, utilization and operation of any such transportation facilities, whether completed or under construction, shall be made by the Secretary of War out of funds now or hereafter made available for that purpose.

(c) The Secretary of War is hereby authorized, out of any moneys hereafter made available therefor, to construct or contract for the construction of terminal facilities for the interchange of traffic be-

tween the transportation facilities operated by him under this section and other carriers whether by rail or water and to make loans for such purposes under such terms and conditions as he may determine to any State whose constitution prohibits the ownership of such terminal facilities by other than the State or a political subdivision thereof.

(d) Any transportation facilities owned by the United States and included within any contract made by the United States for operation on the Mississippi River above Saint Louis, the possession of which reverts to the United States at or before the expiration of such contract, shall be operated by the Secretary of War so as to provide facilities for water carriage on the Mississippi River above Saint Louis.

(e) The operation of the transportation facilities referred to in this section shall be subject to the provisions of the Interstate Commerce Act as amended by this Act or by subsequent legislation, and to the provisions of the 'Shipping Act 1916,' as now or hereafter amended, in the same manner and to the same extent as if such transportation facilities were privately owned and operated; and all such vessels while operated and employed solely as merchant vessels shall be subject to all other laws, regulations and liabilities governing merchant vessels, whether the United States is interested therein as owner, in whole or in part, or holds any mortgage, lien, or interest therein. For the performance of the duties imposed by this section the Secretary of War is authorized to appoint or employ such number of experts, clerks, and other employees as may be necessary for service in the District of Columbia or elsewhere, and as may be provided for by Congress. [41 Stat. L. 458.]"

"SEC. 500. It is hereby declared to be the policy of Congress to promote, encourage and develop water transportation, service and facilities in connection with the commerce of the United States, and to foster and preserve in full vigor both rail and water transportation.

It shall be the duty of the Secretary of War, with the object of promoting, encouraging, and develop-

ing inland waterway transportation facilities in connection with the commerce of the United States, to investigate the appropriate types of boats suitable for different classes of such waterways; to investigate the subject of water terminals, both for inland waterway traffic and for through traffic by water and rail, including the necessary docks, warehouses, apparatus, equipment, and appliances in connection therewith, and also railroad spurs and switches connecting with such terminals, with a view to devising the types most appropriate for different locations, and for the more expeditious and economical transfer or interchange of passengers or property between carriers by water and carriers by rail; to advise with communities, cities and towns regarding the appropriate location of such terminals, and to co-operate with them in the preparation of plans for suitable terminal facilities; to investigate the existing status of water transportation upon the different inland waterways of the country, with a view to determining whether such waterways are being utilized to the extent of their capacity, and to what extent they are meeting the demands of traffic, and whether the water carriers utilizing such waterways are interchanging traffic with the railroads; and to investigate any other matters that may tend to promote and encourage inland water transportation. It shall also be the province and duty of the Secretary of War to compile, publish and distribute, from time to time, such useful statistics, data and information concerning transportation on inland waterways as he may deem to be of value to the commercial interests of the country.

The words 'inland waterway' as used in this section shall be construed to include the Great Lakes. [41 Stat. L. 499.]"

Subsequently, by an Act entitled, "An Act to Create the Inland Waterways Corporation, for the purpose of carrying out the Mandate and Purpose of Congress, as appears in sections 201 and 500 of the Transportation Act, and for other purposes," approved June 7, 1924 (43

Stat. L. 360), Congress created the Inland Waterways Corporation, and provided that the Secretary of War shall be deemed to be the incorporator and shall govern and direct the corporation in the exercise of the functions vested in it by the Act.

The corporation was empowered and directed to continue the conduct of the transportation and terminal facilities provided for by the above quoted sections of the Transportation Act, and to initiate water carriage on the Mississippi River above Saint Louis. The operation of these facilities was declared to be subject to the provisions of the Interstate Commerce Act, as amended. The corporation was empowered to conduct the business of a common carrier by water.

In the fiscal year ending June 30, 1925, the Inland Waterways Corporation made a gross earning of $3,339,542, and carried on the Mississippi River alone approximately 100,000 tons of freight per month. Among other benefits to the Mississippi Valley and particularly the grain producers thereof, through the Barge Line rate of 2 mills per ton per mile available for the movement of the exportable surplus of grain and grain products, large quantities of grain have been transported to foreign markets at an average saving in transportation costs of 4 cents a bushel. If water transportation could have been conducted by the Barge Line on the Missouri River and on the Mississippi as far north as the Twin Cities, this saving would have been very materially increased.

These defendants aver that in and by the provisions of these Acts of Congress there devolved upon the Secretary of War the duty of fostering inland water transportation in the Mississippi Valley, and of preserving the same, and of conducting such transportation in accordance with the provisions of the Interstate Commerce

Act in such a way as to regulate transportation on these waterways for the benefit of the nation at large.

37. In fostering and preserving both rail and inland water transportation in the United States since the World War, due to fundamental economic changes, there have arisen a number of new and perplexing problems. During the last ten years the main line mileage of the railroads of the United States has made little or no increase. The traffic handled by the railroads in this period has increased approximately 25 per cent. Handling this vast increase of traffic has been accomplished by the railroads by increased efficiency in operation, better organization, and, primarily by the building of transportation units of greatly increased capacity. It has been the history of the commerce growth of the United States that it doubles in volume every twenty years. During the last ten years there has been an entirely insufficient additional investment for the purpose of meeting future increases in traffic. The railroads at the same time have been confronted with rapidly rising costs, not only of railroad labor, but of all supplies, such as fuel, equipment, etc., used in transportation. At the same time, due to the effect of regulation and of the economic demands of certain sections of the country and of the population thereof, there has not been as great a proportionate increase in the rates which the railroads are entitled to collect for the service furnished by them as there has been in their operating costs. The result has been a material decline in the value of railroad securities, and the railroads to-day find it increasingly difficult to finance additional investment in transportation facilities.

The Mississippi Valley is the great food producing area of the United States. Much of this territory is

virgin today, to the extent that crops may be raised thereon without replacing in the soil minerals extracted by the harvest. The land available for cultivation is practically all occupied and has been for several years last past. For many years the total farm production of the United States has exceeded the total consumption, and the exportable surplus has been sold abroad in competition with farm products of other countries throughout the world. The amount of the exportable surplus has been so great that it is an accepted axiom that the price of the exportable farm surplus of the United States determines to a large extent the price received by the producer for his entire product. Most of the exportable surplus of the United States has been in the past sold in Europe, whose buying power has been greatly depleted by the World War. In addition new farm areas have been developed in South America, new cotton producing territories in Egypt and India, and most of the food producing countries whose surplus competes with that of the United States in the world market produce their grain and other products at points very much nearer water transportation to the consuming market than is the situation of the farmer in the Mississippi Valley. Generally farm products in the Mississippi Valley have to be transported approximately 1000 miles to water transport to the world market. The increase in the cost of transportation, the increasing competition of foreign farm products and the increasing costs of farm operation in the United States have all served to materially decrease the rewards of the food producer of the Mississippi Valley. Water transportation is materially cheaper than rail transportation. Rail transportation costs approximately ten times as much as water transportation on the Great Lakes, and five to seven times as

much as water transportation on the Mississippi waterway system. The only relief to the farmer in the Mississippi Valley is to render available water transportation wherever it is possible.

38. The Illinois River waterway to the Mississippi consists of the Chicago River connecting with the Sanitary and Ship Canal of the defendant, The Sanitary District of Chicago, the Illinois and Desplaines Rivers to the Mississippi. The Chicago River and the Sanitary and Ship Canal are readily navigable to vessels with a draft not exceeding 20 feet, as far as Lockport, the end of the Canal. The waterway from Lockport to Utica on the Illinois River is being developed by the defendant State of Illinois, and with reference to this waterway, these defendants refer to the answer of the defendant State of Illinois herein and pray leave to adopt the same, as their answer.

The United States, as a result of various appropriations in various Rivers and Harbors Acts, has undertaken and is undertaking the development of the waterway from Utica, Illinois, to Grafton, Illinois, at the junction of the Illinois and Mississippi Rivers. Generally speaking the portion of this waterway to be developed by the State of Illinois would create a canalized river with a series of locks and dams, required by the material drop in altitude at the beginning and end of this section of the river. The latest report of the Chief of Engineers submitted to the present Congress, and adopted in the pending Rivers and Harbors Bill therein, recommends the continuance in the Illinois River of two Federal dams with the appurtenant locks, and the elimination of two state dams previously constructed by the State of Illinois in aid of a scheme of development of this waterway. For the purposes of the canalized rived

from Lockport to Utica, a flow of water not greatly in excess of 2,000 c.f.s. would be reasonably sufficient to furnish adequate navigation conditions in this section of the waterway, although if the flow be as great as that authorized by the permit of March 3, 1925, aforesaid, the depth in this section of the waterway would be 9 feet instead of 7 feet to 8 feet. In the balance of the Illinois River, due to the flat character of the country through which the river flows and the small drop in this long stretch of river, provided a constant and considerable amount of dredging be furnished, with not much in excess of 2,000 c.f.s. of flow from Lake Michigan, a 7-foot waterway may be maintained. But the two Federal dams would be required with this flow and possibly one or both of the state dams, and where dams are maintained, in order to hold up water to preserve channel depths, locks are required, which slows down and delays transportation, and greatly increases the cost thereof. With a flow from Lake Michigan of an amount as great as specified in the permit of March 3, 1925, aforesaid, a 9-foot depth may be maintained, at least two of the four existing dams may be eliminated, and during a considerable portion of the navigation season all of the dams are unnecessary. Thus transportation under this enhanced flow is greatly improved and the cost thereof materially decreased.

From Grafton to St. Louis on the Mississippi River, navigation is difficult, and during large portions of the year materially impeded by lack of sufficient water to ensure adequate channel depths. The water diverted from Lake Michigan under the present permit of March 3, 1925, constitutes more than 25 per cent of the volume of the water in the river at St. Louis at low water flow and throughout this stretch of river, and furnishes at

critical points of navigation during low water periods from 2½ to 3 feet of depth over the bars, and for purposes of practical navigation under existing conditions, the maintenance of this flow to an amount not less than the amount specified in the permit aforesaid, is essential and cannot be avoided.

From the mouth of the Ohio River, as far south as Vicksburg, the channel of the Mississippi varies very little, presenting numerous difficulties for navigation, in places where channel depths rapidly become uncertain during low water, and where bars and other obstructions to navigation frequently and without notice are formed. During low water periods of navigation, as far south as Vicksburg, Mississippi, and in increasing amounts from there north, the water diverted from Lake Michigan in the amount specified in the permit aforesaid, furnishes at least one foot additional depth over what would otherwise be found at the critical points over the bars, and is essential under present conditions for the maintenance of the channel depth specified in the Federal project for the improvement of the Mississippi River navigation.

39. The demands for transportation vary in different parts of the Mississippi Valley at different times of the year. If water transportation be adequately furnished on the Mississippi as far north as the Twin Cities and from Pittsburgh down on the Ohio River and to upper Missouri River points on the Missouri River, and also on the essential connection between this system and the Great Lakes via the Illinois River waterway, the traffic offered will induce the furnishing of a much greater amount of equipment than if this system of inland waterway transportation remain as at present cut up into separately operated and disconnected fragments.

The volume of traffic would increase in inverse ratio to the extension of the system, and if the system were fully developed it would be possible to concentrate facilities from one part of the system upon another to meet changed conditions, which will occur from time to time, thus greatly facilitating not only the service to be rendered by the system, but also decreasing the cost of operation. At the present time, if the construction work on the Illinois Waterway were finished, only during a portion of the year, even with the benefit of the flow from Chicago, could a nine-foot channel depth be maintained from New Orleans to Chicago, as additional work to deepen the channel of the Mississippi from the mouth of the Ohio to Grafton, Illinois, must be completed in order to maintain therein a nine-foot channel depth, the Government project at present, from St. Louis north providing only for six feet therein. With a six-foot channel depth which must be crossed, adequate loading of barges destined from or to Chicago or New Orleans, could not be accomplished, and the cost of transportation would be very materially increased. If the water from Lake Michigan which materially serves to increase the present channel depths in the Mississippi were materially decreased in amount, it would be many years under present plans before adequate navigation conditions, either on the Mississippi or Illinois Waterway, could be achieved, and the development of this system of navigation, so essential to the continued prosperity and growth of the great Mississippi Valley would be rendered impossible of achievement.

40. The manufacturing and distributing centers of the Mississippi Valley have, during recent years, been subject to increasingly harmful competition from similar producing and distributing centers on the Atlantic

Seaboard. By the expenditure of public funds derived from taxation of the entire country, including the Mississippi Valley, the Congress has caused the completion of the Panama Canal, which furnishes cheap coast to coast water transportation. Producing and manufacturing centers of the Mississippi Valley desiring to sell their products on the Pacific Coast must transport them by rail, while their competitors on the Atlantic Seaboard have available the much cheaper coast to coast water transportation, through the Panama Canal. With the great and material increase in water transportation, resulting from the greatly increased number of vessels engaged in this coast to coast transportation, due to the upbuilding of the American Merchant Marine during the World War, the difference in transportation cost in favor of the Atlantic Seaboard has become so great as in many instances to render it impossible for producers, manufacturers and shippers in the Mississippi Valley to compete on the Pacific Coast with products originating on the Atlantic Seaboard. The inevitable tendency of this situation is to induce the relocating of industries and manufacturers on the Seaboard and away from the food producing Mississippi Valley. If this tendency be carried to its conclusion, the food producer in the Mississippi Valley will be compelled to pay a greatly increased cost for all manufactured articles, due to the fact that they must be transported from points of production on the seaboard, instead of from nearby points of production now located within the Valley. It is only by proper and adequate development of water transportation on the Mississippi Inland Waterway system, described above, that any relief is offered to the manufacturer and shipper located throughout the Mississippi valley. Manufacturers at St. Paul, Chicago, St. Louis

and Memphis, and even as far east as Pittsburgh, may then avail themselves of the barge line transportation to New Orleans, and water transportation from there to the Pacific Coast, and thus may compete on equal or approximately equal terms with the producing centers of the Atlantic Seaboard.

41. It has been the history of transportation in the United States that the development of new transportation facilities creates traffic. It is the policy of Congress, announced in Section 500 of the Transportation Act aforesaid, to foster and preserve side by side both rail and water transportation. The development of the Mississippi Inland Waterway system above described will not serve to decrease the earnings of the railroads located in the Mississippi Valley, but on the contrary will relieve these railroads of the transportation of large quantities of heavy bulk freight which is carried at very low rates and will originate and create much additional traffic, and must eventually serve to greatly increase rather than decrease the revenues of these roads. The operations of the Mississippi-Warrior Barge Line on the Mississippi River have already served to demonstrate that the carriers whose lines parallel the transportation furnished by the Barge Line have actually received more freight from the Barge Line than they would have received had it not been originated by the Barge Line, than they have lost in competition with the Barge Line.

41. These defendants therefore show unto this Honorable Court that in and by the provisions of Section 10 of the Rivers and Harbors Act of March 3, 1899, the provisions of Sections 201 and 500 of the Transportation Act, and the provisions of the Inland Waterways Corporation Act aforesaid, and also by virtue of his numerous

responsibilities in connection with the National Defense, the Secretary of War is in the first place vested with authority within his discretion to authorize changes in the capacity of any of the navigable waters of the United States, even though such changes without his authorization should, as a matter of law, be deemed to be obstructions to navigation; and that the Secretary of War is charged with the duty of fostering, preserving and creating water transportation on the waterways of the Mississippi Valley, and of conducting transportation on the Mississippi Waterway System, through the instrumentality of the Inland Waterways Corporation, and in the conduct of such transportation so regulating the same by the fixing of rates to be charged therefor and the affording of facilities of transportation, as to best serve the interests of the People of the United States, and particularly the residents of the Mississippi Valley.

The defendants further aver that in the exercise of the discretion aforesaid, the Secretary of War is fully authorized to permit diversion of water from Lake Michigan into the Sanitary and Ship Canal of the defendant, The Sanitary District of Chicago, and thence into the Desplaines and Illinois Rivers to the Mississippi, even though such diversions do in a slight measure alter the capacity of any of the navigable waterways of the United States, and such exercise of discretion is fully justified by all the facts aforesaid, and the defendants further aver that the exercise of such discretion, justified as it is by the facts aforesaid, is a matter not within the power of this Honorable Court to review, but presents solely a question of legislative or administrative policy in due furtherance of the policy of the Congress announced in the Acts aforesaid, and patricularly in the first paragraph

of Section 500 of the Transportation Act of 1920, each and all of which enactments are constitutional exercises of the power of the Congress to regulate interstate commerce.

All of which matters and things these defendants are ready to maintain and prove, as this Honorable Court shall direct, and humbly pray to be hence dismissed with their reasonable costs and charges in this behalf most wrongfully sustained.

STATE OF MISSOURI,
By NORTH T. GENTRY,
Attorney General.

STATE OF KENTUCKY,
By FRANK E. DAUGHERTY,
Attorney General.

STATE OF TENNESSEE,
By FRANK M. THOMPSON,
Attorney General.

STATE OF LOUISIANA,
By PERCY SAINT,
Attorney General.

DANIEL N. KIRBY,
CORNELIUS LYNDE,
Solicitors.